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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KELVIN D. DANIEL, et al

Plaintiffs,

vs.

SWIFT TRANSPORTATION
CORPORATION,

Defendant

Case No.: 2:11-CV-01548-ROS

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR JURY**

1 Now come the Plaintiffs, Kelvin D. Daniel, Tanna
2 Hodges and Robert R. Bell, Jr. on behalf of themselves
3 and all other similarly situated individuals and allege
4 the following claims:
5

6 **PRELIMINARY STATEMENT**

7 1. This is a class action on behalf of consumers
8 who were the subject of criminal background reports
9 obtained by Swift Transportation Corporation ("Swift")
10 as a precondition of employment with Swift during the
11 five-year period preceding the filing of this action
12 (the "Class Period") seeking remedies under the Fair
13 Credit Reporting Act ("FCRA"), 15 U.S.C. §1681, *et seq.*
14
15

16 **JURISDICTION AND VENUE**

17 2. The Court has subject matter jurisdiction
18 pursuant to 28 U.S.C. §1331 and 15 U.S.C. §1681p.
19

20 3. Venue is proper in the District of Arizona
21 because a substantial part of the events or omissions
22 giving rise to the allegations contained herein
23 occurred in the District of Arizona. 28 U.S.C. §
24 1391(b). Further, Swift maintains a principal place of
25 business in this judicial district.
26
27
28

PARTIES

4. Kelvin Daniel is a citizen of the State of Georgia, a Gulf War veteran and a "consumer" within the meaning of 15 U.S.C. § 1681a.

5. Tanna Hodges is a citizen of the State of Texas and a "consumer" within the meaning of 15 U.S.C. § 1681a.

6. Robert R. Bell, Jr. is a citizen of the State of Pennsylvania and a "consumer" within the meaning of 15 U.S.C. § 1681a.

7. Swift is a for-profit corporation with a principal place of business in Maricopa County, State of Arizona.

8. Further, Swift is a "person" using "consumer reports" to make "employment decisions" and take "adverse action" against "consumers", as those terms are defined by 15 U.S.C. § 1681a.

ALLEGATIONS AS TO DANIEL

9. On or about December 27, 2010, Daniel applied for a commercial truck driver position with Swift online.

10. Following a successful application process,

1 Daniel was hired and scheduled to attend Swift's
2 orientation program.

3
4 11. On or about January 24, 2011, the first day of
5 in-person orientation, Swift ordered a criminal
6 background report regarding Daniel from HireRight
7 Solutions, Inc. ("HireRight") a consumer reporting
8 agency as defined by 15 U.S.C. § 1681a, without proper
9 authorization from Daniel.
10

11 12. At no time following Daniel's in-person
12 interaction with Swift, did he receive a clear,
13 conspicuous and stand-alone disclosure that a criminal
14 background report would be obtained for employment
15 purposes.
16

17
18 13. Immediately after receiving the subject
19 criminal background report, Swift took adverse action
20 against Daniel, dismissing him from orientation based
21 upon the information in the retrieved criminal
22 background report.
23

24 14. At no time did Swift provide Daniel with any
25 verbal or written notice that it intended to take
26 adverse action by declining employment based upon the
27 results of the report.
28

1 15. Daniel was not provided a copy of the report
2 or a summary of his rights as required by 15 U.S.C. §
3 1681b(b) (3) .
4

5 **ALLEGATIONS AS TO HODGES**

6 16. On or about September 25, 2009, Hodges applied
7 in-person for a commercial truck driver position with
8 Swift. A copy of Hodges's application is attached as
9 Exhibit A.
10

11 17. At no time did Hodges receive a clear,
12 conspicuous and stand alone disclosure that a criminal
13 background report would be obtained for employment
14 purposes.
15

16 18. Without proper authorization from Hodges,
17 Swift ordered a criminal background report regarding
18 Hodges from HireRight.
19

20 19. Immediately after receiving the subject
21 criminal background report, Swift took adverse action
22 against Hodges by determining to disqualify her from
23 further consideration for employment based upon the
24 information in the retrieved criminal background
25 report.
26
27

28 20. At no time did Swift provide Hodges with any

1 verbal or written notice that it intended to take
2 adverse action by declining employment based upon the
3 results of the report.
4

5 21. Hodges was not provided a copy of the report
6 or a summary of her rights as required by 15 U.S.C. §
7 1681b(b)(3).
8

9 **ALLEGATIONS AS TO BELL**

10 22. On or about October 2, 2009, Bell applied via
11 facsimile for a commercial truck driver position with
12 Swift. A copy of Bell's application is attached as
13 Exhibit B. Swift's application provides no indication
14 that a consumer report may be obtained for employment
15 purposes.
16

17 23. Bell did not authorize, nor was he requested
18 by Swift verbally, electronically or in writing, to
19 authorize the procurement of a criminal background
20 report to be provided HireRight.
21

22 24. Further, prior to obtaining Bell's criminal
23 background report, Swift did not provide Bell with
24 verbal, electronic or written notice of his rights to:
25
26 1) obtain a free copy of a criminal background report
27 from the consumer reporting agency within 60 days; and
28

1 2) to dispute the accuracy or completeness of any
2 information in the consumer report directly with the
3 consumer reporting agency.
4

5 25. After receiving Bell's application, Swift -
6 without any authorization from Bell - ordered a
7 criminal background report regarding Bell from
8 HireRight that grossly misidentified Bell as having
9 been convicted of felony burglary, felony robbery,
10 grand larceny and several parole violations, all
11 leading to a ten-year prison sentence. None of these
12 crimes were committed by Bell.
13
14

15 26. On October 2, 2009, immediately after
16 receiving the subject criminal background report, Swift
17 took adverse action against Bell by determining not to
18 hire him based upon the results of the report.
19

20 27. At no time did Swift provide Bell with any
21 verbal, written or electronic notice that it intended
22 to take adverse action by declining employment based
23 upon the results of the report.
24

25 28. Bell was never advised by Swift of the reason
26 for the adverse action, nor did he learn of the
27 inaccurate report until receiving a copy via U.S. Mail
28

1 from HireRight on or about October 7, 2009, when he
2 received a derogatory letter and a copy of the report
3 from HireRight.
4

5 **ALLEGATIONS AS TO THE COMMON QUESTIONS**

6 29. For many years, Swift has purchased criminal
7 background reports from consumer reporting agencies
8 trafficking in the reputations of America's workforce,
9 which are used as a basis for taking adverse action
10 against job applicants.
11

12 30. Swift does not provide or obtain an
13 appropriate disclosure and authorization from job
14 applicants as required by 15 U.S.C. § 1681b(b)(2) prior
15 to acquiring these criminal background reports.
16

17 31. Further, Swift does not provide pre-adverse
18 action notice to job applicants, including a copy of
19 the applicants' criminal background report and a
20 statement of the applicants' rights as required by 15
21 U.S.C. §§ 1681b(b)(3) and 1681m(a).
22

23 32. Swift's violations of the FCRA have been
24 willful, wanton and reckless in that Swift knew, or
25 reasonably should have known, that it was failing to
26 comply with the requirements of the FCRA.
27
28

1 33. 15 U.S.C. §1681n(a) permits a consumer to
2 recover statutory and punitive damages, along with
3 attorneys' fees and costs for willful violations of the
4 FCRA.
5

6 **CLASS ACTION ALLEGATIONS**

7 34. Pursuant to F. R. Civ. P. 23, Daniel, Hodges
8 and Bell bring this action on behalf of the Class
9 initially defined below:
10

11 Consumers residing in the United
12 States who applied for employment
13 with Swift, and about whom Swift
14 procured a criminal background
15 report for employment purposes
during the application process.

16 35. Hodges and Daniel also allege the following
17 sub-classes, of which they are a member:
18

19 **Inadequate Disclosure and Authorization**
20 **In-Person Contact**

21 a. Consumers residing in the United
22 States who applied for
23 employment with Swift, and
24 during the application process,
25 about whom Swift procured a
26 criminal background report or
27 other consumer report without
28 first in a document that
consisted solely of the
disclosure, (i) providing the
consumer with a disclosure in
writing in a document that
consisted solely of the
disclosure that a consumer

1 report would be obtained for
2 employment purposes, and (ii)
3 obtaining the consumer's express
4 written authorization to procure
5 such consumer report.

6 **Pre-Adverse Action Notice**
7 **In-Person Applicants**

8 b. All natural persons
9 residing in the United States
10 (a.) who applied for an
11 employment position with
12 Defendant or any of its
13 subsidiaries, (b.) as part of
14 this application process, were
15 the subject of a consumer report
16 obtained by Defendant during the
17 applicable limitations period as
18 established by 15 U.S.C. 1681p,
19 preceding the filing of this
20 action and during its pendency,
21 (c.) whose report was obtained
22 by Swift at the same time or
23 after there had been at least
24 one in-person interaction with
25 the consumer, (d.) where that
26 consumer report contained at
27 least one derogatory item that
28 would disqualify the person from
such position under Defendant's
hiring policies, (e.) which
consumer was not then approved
or hired for the position, (f.)
and to whom Defendant did not
provide a copy of the consumer
report and other disclosures
stated at 15 U.S.C. §
1681b(b)(3)(A)(ii) at least five
business days before the date
the employment decision is first
noted in Defendant's records.

1 36. Bell also alleges the following sub-classes,
2 of which he is a member:

3 **Inadequate Disclosure and Authorization**
4 **Contact by Facsimile, Telephone, Mail, Computer and**
5 **Similar Means**

6 a. Consumers residing in the United
7 States who applied for
8 employment with Swift via
9 facsimile, an internet website,
10 electronic mail, regular mail,
11 or through a third party and
12 during the application process,
13 Swift procured a criminal
14 background report or other
15 consumer report, which report
16 was obtained by Swift before
17 there had been at least one
18 direct telephone or in-person
19 interaction with the consumer,
20 without (a.) first obtaining
21 direct electronic or written
22 authorization to procure a
23 consumer report, and/or (b.)
24 directly providing the consumer
with notice of their right to
obtain a free copy of a consumer
background report from the
consumer reporting agency within
60 days, and to dispute the
accuracy or completeness of any
information in the consumer
report directly with the
consumer reporting agency.

25 **Adverse Action**
26 **Contact by Facsimile, Telephone, Mail, Computer and**
27 **Similar Means**

28 b. All natural persons residing in
the United States (a.) who
applied for an employment

1 position with Defendant or any
2 of its subsidiaries, (b.) as
3 part of this application process
4 were the subject of a consumer
5 report obtained by Defendant
6 during the applicable
7 limitations period as
8 established by 15 U.S.C. 1681p,
9 preceding the filing of this
10 action and during its pendency,
11 (c.) where that consumer report
12 contained at least one
13 derogatory item that would
14 disqualify the person from such
15 position under Defendant's
16 hiring policies, (d.) which
17 consumer was not then approved
18 or hired for the position, (e.)
19 who did not have either direct
20 telephone or direct in-person
21 contact with Swift and (f.) to
22 whom Defendant did not provide
23 direct electronic or written
24 notice that: the adverse action
25 was taken based in whole or in
26 part on the consumer report, the
27 name, address, and telephone
28 number of the consumer reporting
agency, that the consumer
reporting agency did not make
the decision to take adverse
action and would be unable to
provide the consumer with
specific reasons why the adverse
action was taken, and that the
consumer could request a free
copy of the report and dispute
the accuracy or completeness of
the report, as required by
1681b(b)(3)(B).

37. Upon information and belief, the putative
Class exceeds 5,000 members. Information concerning

1 the exact size of the putative class is within the
2 exclusive possession of Swift.

3
4 38. The Class members are so numerous that joinder
5 of all members is impracticable.

6 39. Hodges', Daniel's and Bell's claims are
7 typical of the claims of the other Class members as all
8 Class members were similarly affected by Swift's
9 unlawful conduct in violation of the FCRA.

10
11 40. Hodges, Daniel and Bell will fairly and
12 adequately protect the interest of the Class members
13 and has retained counsel competent and experienced in
14 complex class-action litigation. Hodges, Daniel, and
15 Bell are members of the Class and do not have any
16 interests antagonistic to or in conflict with the
17 members of the Class. Further, Hodges's, Daniel's and
18 Bell's claims are the same as those of the Class, which
19 all arise from the same operative facts and are based
20 upon the same legal theories.

21
22 41. Common questions of law and fact exist as to
23 all Class members and predominate over any questions
24 solely affecting individual Class members, including:
25
26
27
28

In-Person Contact

- a. Whether Swift's standard procedure violated 15 U.S.C. §1681b(b)(2)(A)(i) by failing to make a "clear and conspicuous" disclosure in a document that consists solely of the disclosure;
- b. Whether it is Swift's standard procedure to obtain a written authorization to procure or cause to be procured consumer reports for employment purposes required by §1681b(b)(2)(A)(ii);
- c. Whether it is Swift's standard procedure to provide a copy of the consumer report to the applicant or employee before declining to hire or discharging the applicant or employee based on the results thereof as required by 15 U.S.C. §1681b(b)(3)(A)(i);
- d. Whether Swift provided a copy of a summary of the applicant or employee's rights under the FCRA before declining to hire or discharging the applicant or employee as required by 15 U.S.C. §1681b(b)(3)(A)(ii);
- e. Whether Swift provided oral, written or electronic notice of the adverse action to the consumer that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer with the specific reasons why the adverse action

1 was taken as required by 15
2 U.S.C. §1681m(a) (2) (B);

3 f. Whether Swift provided oral,
4 written or electronic notice of
5 the consumer's right to obtain a
6 free copy of the consumer report
7 on the consumer from the
8 consumer reporting agency that
9 prepared the report as required
10 by 15 U.S.C. § 1681m(a) (3) (A));

11 **Contact by Facsimile, Telephone, Mail, Computer and**
12 **Similar Means**

13 g. Whether Swift's standard
14 procedure violated 15 U.S.C. §
15 1681b(b) (2) (B) (i) by failing to
16 provide the consumer with
17 verbal, electronic, or written
18 notice of a right to obtain a
19 free copy of a consumer
20 background report from the
21 consumer reporting agency within
22 60 days, and to dispute the
23 accuracy or completeness of any
24 information in the consumer
25 report directly with the
26 consumer reporting agency.

27 h. Whether Swift's standard
28 procedure violated 15 U.S.C.
§1681b(b) (2) (B) (ii) by failing
to obtain verbal, electronic or
written consent to procure a
consumer report;

i. Whether Swift, within 3 business
days of taking adverse action,
provided oral, written or
electronic notification to
consumer that adverse action has
been taken based in whole or in
part on a consumer report
received from a consumer

1 reporting agency as required by
2 §1681b(b) (3) (B) (i) (I);

3 j. Whether Swift, within 3 business
4 days of taking adverse action,
5 provided oral, written or
6 electronic notification to
7 consumer that of the name,
8 address and telephone number of
9 the consumer reporting agency
10 that furnished the consumer
11 report (including a toll-free
12 telephone number established by
the agency if the agency
compiles and maintains files on
consumers on a nationwide basis)
as required by
§1681b(b) (3) (B) (i) (II);

13 k. Whether Swift, within 3 business
14 days of taking adverse action,
15 provided oral, written or
16 electronic notification to
17 consumer that the consumer
18 reporting agency did not make
19 the decision to take the adverse
20 action and is unable to provide
21 to the consumer the specific
22 reasons why the adverse action
23 was taken; as required by
24 §1681b(b) (3) (B) (i) (III);

25 l. Whether Swift, within 3 business
26 days of taking adverse action,
27 provided oral, written or
28 electronic notification to
consumer that the consumer may,
upon providing proper
identification, request a free
copy of a report and may dispute
with the consumer reporting
agency the accuracy or
completeness of any information

1 in a report as required by
2 §1681b(b) (3) (B) (i) (IV);

3 m. Whether Swift, within 3 business
4 days of receiving a consumer's
5 request for a copy of a consumer
6 report from the person who
7 procured the report, together
8 with proper identification,
9 provides the consumer a copy of
10 a report and a copy of the
11 consumer's rights as prescribed
12 by the Federal Trade Commission
13 under section 1681g (c) (3) of
14 this Fair Credit Reporting Act
15 as required by
16 §1681b(b) (3) (B) (ii); and

17 n. Whether Swift's failures to
18 comply with the FCRA were
19 willful.

20 42. A class action is superior to other available
21 methods for the fair and efficient adjudication of this
22 controversy because the membership of the Class is so
23 numerous and involves claims that, taken individually,
24 may not justify the costs and effort of bringing suit.

25 43. Further, the prosecution of several actions by
26 individual members of the Class would create a risk of
27 varying adjudications with respect to members of the
28 Class, as well as create inconsistent standards of
conduct for those opposing the Class. Additionally,
individual actions by members of the Class may be

1 dispositive of the interests of other members not
2 parties to the adjudication of the claim, which would
3 impair or impede the ability of those individuals to
4 protect their interests.
5

6 **COUNT ONE - CLASS CLAIM BY DANIEL AND HODGES**
7 **DISCLOSURE AND AUTHORIZATION - IN-PERSON CONTACT**

8 44. Daniel and Hodges reallege and incorporate by
9 reference all preceding allegations of law and fact.

10 45. Swift willfully violated 15 U.S.C. §
11 1681b(b) (2) (A) (i) by failing to provide applicants and
12 employees with a clear and conspicuous written
13 disclosure in a document consisting solely of the
14 disclosure that a consumer report may be obtained for
15 employment purposes.
16

17 46. Swift willfully violated 15 U.S.C. §
18 1681b(b) (2) (A) (ii) by failing to obtain a valid
19 authorization in writing from Daniel, Hodges and the
20 Class members to procure a consumer report for
21 employment purposes.
22

23 47. Daniel, Hodges and the Class members seek
24 statutory damages for these violations pursuant to 15
25 U.S.C. § 1681n(a) (1) (A) .
26

27 48. Daniel, Hodges and the Class members also seek
28

1 punitive damages for these violations pursuant to 15
2 U.S.C. § 1681n(a)(2).

3
4 49. In the alternative to the allegations that
5 these violations were willful, Daniel, Hodges and the
6 Class members allege that the violations were negligent
7 and seek issue certification of that issue and an
8 appropriate remedy, if any, pursuant to 15 U.S.C. §
9 1681o.
10

11 **COUNT TWO - CLASS CLAIM BY DANIEL AND HODGES**
12 **PRE-ADVERSE ACTION - IN-PERSON CONTACT**

13 50. Daniel and Hodges reallege and incorporate by
14 reference all preceding allegations of law and fact.
15

16 51. Swift willfully violated 15 U.S.C. §
17 1681b(b)(3)(A)(i) by failing to provide a copy of the
18 consumer report used to make an employment decision to
19 Daniel, Hodges and the Class Members before taking
20 adverse action that was based in whole or in part on
21 that report.
22

23 52. Swift willfully violated 15 U.S.C. §
24 1681b(b)(3)(A)(ii) by failing to provide a copy of the
25 summary of rights required by this section to Daniel,
26 Hodges and the Class Members before taking adverse
27 action that was based in whole or in part on a consumer
28

1 report.

2 53. Daniel, Hodges and the Class members seek
3 statutory damages for these violations pursuant to 15
4 U.S.C. § 1681n(a) (1) (A) .
5

6 54. Daniel, Hodges and the Class members also seek
7 punitive damages for these violations pursuant to 15
8 U.S.C. § 1681n(a) (2) .
9

10 55. In the alternative to the allegations that
11 these violations were willful, Daniel, Hodges and the
12 Class members allege that the violations were negligent
13 and seek issue certification of that issue and an
14 appropriate remedy, if any, pursuant to 15 U.S.C. §
15 1681o.
16

17
18 **COUNT THREE - CLASS CLAIM BY BELL**
19 **AUTHORIZATION - CONTACT BY FACSIMILE, MAIL, COMPUTER**
20 **AND SIMILAR MEANS**

21 56. Bell realleges and incorporates by reference
22 all preceding allegations of law and fact.

23 57. Swift willfully violated 15 U.S.C.
24 §1681b(b) (2) (B) (ii) by failing to obtain the
25 applicants' oral, written or electronic consent prior
26 to procuring a consumer report for employment purposes.
27

28 58. Bell and the Class members seek statutory

1 damages for these violations pursuant to 15 U.S.C.
2 §1681n(a)(1)(A).

3
4 59. Bell and the Class members also seek punitive
5 damages for these violations pursuant to 15 U.S.C.
6 §1681n(a)(2).

7
8 60. In the alternative to the allegations that
9 these violations were willful, Bell and the Class
10 members allege that the violations were negligent and
11 seek issue certification of that issue and an
12 appropriate remedy, if any, pursuant to 15 U.S.C.
13 §1681o.
14

15 **COUNT FOUR - CLASS CLAIM**
16 **ADVERSE ACTION - CONTACT BY FACSIMILE, MAIL, COMPUTER**
17 **AND SIMILAR MEANS**

18 61. Bell realleges and incorporates by reference
19 all preceding allegations of law and fact.

20 62. Swift willfully violated 15 U.S.C.
21 §1681b(b)(3)(B)(i) by taking adverse action based in
22 whole or in part upon the consumer report without
23 providing verbal, electronic or written notice within 3
24 business days of taking the adverse action (i) that
25 adverse has been taken based in whole or in part on the
26 consumer report, (ii) the name, address and telephone
27
28

1 number of the consumer reporting agency, (iii) that the
2 consumer reporting agency did not make the decision to
3 take adverse action and is unable to provide the
4 consumer with specific reasons why the adverse action
5 was taken, (iv) that the consumer may request a free
6 copy of the report and may dispute with the consumer
7 reporting agency the accuracy or completeness of the
8 report.
9

10
11 63. Bell and the Class members seek statutory
12 damages for these violations pursuant to 15 U.S.C.
13 §1681n(a)(1)(A).
14

15 64. Bell and the Class members also seek punitive
16 damages for these violations pursuant to 15 U.S.C.
17 §1681n(a)(2).
18

19 65. In the alternative to the allegations that
20 these violations were willful, Bell and the Class
21 members allege that the violations were negligent and
22 seek issue certification of that issue and an
23 appropriate remedy, if any, pursuant to 15 U.S.C.
24 §1681o.
25

26
27 **WHEREFORE**, Daniel, Hodges, Bell and the putative
28 class respectfully pray for the following relief:

- 1 A. An order certifying the proposed class
2 herein pursuant to Fed. R. Civ. P. 23 and
3 appointing the undersigned counsel to
4 represent same;
5
6 B. The creation of a common fund available
7 to provide notice of and remedy Swift's
8 unlawful conduct;
9
10 C. Statutory and punitive damages for all
11 class claims;
12
13 D. Attorneys' fees, expenses and costs;
14
15 E. Pre-judgment and post-judgment interest
16 as provided by law; and
17
18 F. Such other relief as the Court deems just
19 and proper.

20 Respectfully Submitted,
21

22 STUMPHAUZER O'TOOLE MCLAUGHLIN
23 McGLAMERY & LOUGHMAN CO LPA

24 /s/ Dennis M. O'Toole
25 /s/ Matthew A. Dooley
26 /s/ Anthony R. Pecora

27 LUBIN AND ENOCH, P.C.

28 /s/ Stanley Lubin

LITIGATION ASSOCIATES, P.C.

/s/ Leonard A. Bennett

Counsel for Plaintiffs

JURY DEMAND

Plaintiffs demand a trial by a jury as to all issues presented herein.

STUMPHAUZER O'TOOLE MCLAUGHLIN
McGLAMERY & LOUGHMAN CO LPA

/s/ Matthew A. Dooley

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing First Amended Class Action Complaint was filed electronically this 24th day of October, 2011. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

/s/ Matthew A. Dooley

Counsel for Plaintiffs